A **SANMARU OVERSEAS MARKETING SDN BHD & ANOR**

v.

PT INDOFOOD INTERNA CORP & ANOR

B COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
JAMES FOONG JCA
ZULKEFLI MAKINUDIN JCA
[CIVIL APPEAL NO: W-02-738-2005]
C 12 NOVEMBER 2008

CIVIL PROCEDURE: *Stay of proceedings - Pending appeal - Notice of motion to stay trial in High Court pending appeals to Court of Appeal - Special circumstances - Nugatory principles - Whether defendants* D *estopped by conduct to stay proceedings - Whether trial to proceed without further delay*

By Civil Suit No. D4-22-1149-1993 ('1993 Suit'), the plaintiffs sued the defendants *inter alia* for an order that the latter transfer the trade mark "Indomie" to the first plaintiff. Though pleadings E were deemed to be closed on 8 December 1993, the plaintiffs did not file any summons for direction and the action was never set down for trial. Some nine years later, on 22 October 2002, the plaintiffs applied for them to be substituted with PT Indofood Sukses Makmur Tbk ('Sukses Makmur'), on grounds that the F plaintiffs had been dissolved and liquidated and taken over by Sukses Makmur. On 1 November 2002, the defendants applied to the deputy registrar to strike out the 1993 Suit for want of prosecution, *albeit* unsuccessfully. The defendants had since appealed against this decision to the judge. On 25 June 2004, the G deputy registrar allowed the plaintiffs' application for substitution, but on appeal the learned judge had the application dismissed whereof the plaintiffs and Sukses Makmur appealed to the present court *vide* Civil Appeal No. W-02-653-2005. Subsequently, on 23 June 2005, Sukses Makmur successfully applied to the judge H to be joined as plaintiff in the 1993 Suit, and against this decision the defendants have appealed to the present court *vide* Civil Appeal No. W-02-968-2005. The facts also showed that on 27 June 2005, the learned judge had dismissed the defendants' appeal against the decision of the deputy registrar dismissing their I application to strike out the 1993 Suit for want of prosecution aforesaid, and arising therefrom, the defendants have also appealed

to this court *vide* Civil Appeal No. W-02-738-2005. The appeals aside, the parties, however, had been attending virtually without fail all the pre-trial conferences for case management as scheduled by the learned judge below. Then, on 15 September 2005, the defendants filed an application to the learned judge for an order that proceedings in the 1993 Suit be stayed pending the disposal of their Civil Appeals Nos. W-02-968-2005 and W-02-738-2005 aforesaid. That application was dismissed and, being dissatisfied, the defendants filed the present notices of motion in the present court seeking for stay of action of the 1993 Suit.

Held (dismissing all appeals and ordering trial of 1993 Suit) Per Zulkefli Makinudin JCA delivering the judgment of the court:

(1) The 1993 Suit should without further delay go for trial before the High Court. The parties should stop finding fault and hurling allegations against one another to derail the proper conduct of the trial. (para 5)

(2) Both parties had attended the pre-trial conference for case management on 20 July 2005, and subsequently on 12 September 2005, 15 September 2005 and 12 October 2005. It is also to be noted that a final pre-trial conference for case management was completed on 19 October 2005 when the finalized Analysis of Pleadings prepared by the defendants was handed to the High Court. The defendants had participated in all these pre-trial conferences and had never objected to the various directions given by the court then. That being so, the defendants are estopped from seeking an order to stay the trial. (paras 7 & 8)

(3) There are no special circumstances justifying a stay of the trial in the High Court as any prejudice that may be suffered by the defendants may be compensated in costs. The defendants too have not shown how their appeals in Civil Appeals Nos. W-02-968-2005 and W-02-738-2005 may be rendered nugatory if the trial of the 1993 Suit is proceeded with. Indeed, it is the plaintiffs that would suffer grave prejudice if the trial is adjourned, while the defendants would suffer no prejudice if the trial proceed as scheduled. (paras 9 & 10)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Melalui Guaman Sivil No. D4-22-1149-1993 ('Guaman 1993'), plaintif-plaintif telah mendakwa defendan-defendan antara lain untuk perintah supaya pihak terkemudian tersebut menyerahkan
B cap dagang "Indomie" kepada plaintif pertama. Walaupun pliding dianggap ditutup pada 8 Disember 1993, tiada permohonan saman untuk arahan dipohon oleh plaintif-plaintif menyebabkan tindakan tidak pernah ditetapkan untuk bicara. Lebih kurang sembilan tahun kemudian, pada 22 Oktober 2002, plaintif-plaintif memohon untuk
C menggantikan diri mereka dengan PT Indofood Sukses Makmur Tbk ('Sukses Makmur"), atas alasan bahawa mereka telah digulung dan diselesaikan serta diambil-alih oleh Sukses Makmur. Pada 1 November 2002, defendan-defendan memohon kepada timbalan pendaftar untuk membatalkan Guaman 1993 kerana ketiadaan
D dakwaan, namun tidak berjaya. Defendan-defendan bagaimanapun telah merayu kepada hakim terhadap keputusan ini. Pada 25 Jun 2004, timbalan pendaftar membenarkan permohonan plaintif-plaintif untuk penggantian, namun atas rayuan permohonan ditolak oleh yang arif hakim dan berikutan itu plaintif-plaintif dan Sukses
E Makmur telah merayu ke mahkamah semasa melalui Rayuan Sivil No. W-02-653-2005. Kemudian, pada 23 Jun 2005, Sukses Makmur berjaya memohon kepada hakim untuk dicantumkan sebagai plaintif di dalam Guaman 1993, dan terhadap keputusan ini defendan-defendan telah merayu ke mahkamah semasa melalui
F Rayuan Sivil No.W-02-968-2005. Fakta seterusnya menunjukkan bahawa pada 27 Jun 2005, yang arif hakim telah menolak rayuan defendan-defendan terhadap keputusan timbalan pendaftar yang menolak permohonan mereka untuk membatalkan Guaman 1993 kerana ketiadaan pendakwaan di atas, dan berbangkit dari itu
G defendan-defendan telah juga merayu ke mahkamah semasa melalui Rayuan Sivil No. W-02-738-2005. Walaupun memfailkan rayuan-rayuan ini, pihak-pihak bagaimanapun telah menghadiri boleh dikatakan kesemua mesyuarat pra-perbicaraan untuk pengurusan kes seperti yang dijadualkan oleh yang arif hakim di bawah.
H Kemudian, pada 15 September 2005, defendan-defendan telah memfail permohonan kepada yang arif hakim bagi satu perintah bahawa segala prosiding di dalam Guaman 1993 digantung sementara menunggu keputusan Rayuan-Rayuan Sivil No. W-02-968-2005 dan W-02-738-2005 mereka. Permohon ini telah ditolak
I dan, merasa tidak puashati, defendan-defendan telah memfail Notis Usul di mahkamah semasa memohon penggantungan Guaman 1993.

Diputuskan (menolak semua rayuan dan memerintahkan perbicaraan Guaman 1993)
Oleh Zulkefli Makinudin HMP menyampaikan penghakiman mahkamah:

(1) Guaman 1993 hendaklah segera dibicarakan di hadapan Mahkamah Tinggi. Pihak-pihak juga hendaklah berhenti dari mencari kesalahan dan melemparkan tohmahan terhadap satu sama lain bagi menjejaskan keteraturan perjalanan perbicaraan.

(2) Kedua-dua pihak telah menghadiri mesyuarat pra-perbicaraan untuk pengurusan kes pada 20 Julai 2005, dan seterusnya pada 12 September 2005, 15 September 2005 dan 12 Oktober 2005. Harus juga diingat bahawa satu mesyuarat pra-perbicaraan terakhir untuk pengurusan kes telah dijalankan dengan sempurnanya pada 19 Oktober 2005 bilamana Analisa Pliding yang telah dimuktamadkan telah diserahkan oleh defendan-defendan kepada Mahkamah Tinggi. Defendan-defendan telah mengambil bahagian di dalam kesemua mesyuarat-mesyuarat ini dan tidak sekalipun membuat bantahan terhadapnya. Dalam keadaan sedemikian, defendan-defendan diestop dari memohon perintah untuk menggantung perbicaraan.

(3) Tidak terdapat halkeadaan istimewa bagi menjustifikasikan penggantungan perbicaraan di Mahkamah Tinggi oleh kerana sebaran prejudis yang mungkin dialami oleh defendan-defendan boleh digantirugi dengan kos. Defendan-defendan juga tidak menunjukkan bagaimana rayuan-rayuan mereka di dalam Rayuan-rayuan Sivil No. W-02-968-2005 dan W-02-738-2005 boleh menjadi sia-sia jika perbicaraan Guaman 1993 diteruskan. Malah, plaintif-plaintif akan menanggung prejudis yang berat jika perbicaraan ditangguhkan, sedangkan defendan-defendan tidak menanggung apa-apa prejudis jika ianya diteruskan mengikut jadual.

Legislation referred to:
Rules of the High Court 1980, O. 56 r. 1(3A)

For the appellants - Michael CM Soo (Romesh Abraham & Ong Boo Seng with him); M/s Shook Lin & Bok
For the respondents - Tommy Thomas (Chew Kherk Ying & Elaine Yap Chin Gaik with him); M/s Wong & Partners

Reported by Wan Sharif Wan Ahmad

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JUDGMENT

Zulkefli Makinudin JCA:

[1] There are two (2) notices of motion filed by the appellants fixed for hearing before us. Essentially, the appellants under the respective notice of motions are applying to this court for an order that the proceedings in the High Court of Kuala Lumpur Civil Suit No. D4-22-1149-1993 be stayed pending the disposal of the Court of Appeal, Civil Appeals No. W-02-738-2005 and W-02-968-2005 filed by the appellants. There is also a pending appeal before the Court of Appeal filed by the respondents in Civil Appeal No. W-02-653-2005.

[2] The first appellant is the second defendant and the second appellant is the third defendant in the Civil Suit No. D4-22-1149-1993 filed by the respondents in which the first respondent is the first plaintiff and the second respondent is the second plaintiff. We shall refer the parties as they were in the proceedings before the High Court.

[3] At the outset of the hearing before us, by consent of the parties, the said two notices of motion under Civil Appeal No. W-02-738-2005 and Civil Appeal No. W-02-968-2005 were treated as appeal proper and heard together with the pending Civil Appeal No. W-02-653-2005. The parties also agreed that due compliance with the Rules of the Court of Appeal 1994 relating to appeal be dispensed with.

[4] To have a better understanding of all the matters and issues arising under the said three appeal cases, we would narrate a brief summary of them as follows:

i. The first and second plaintiffs, commenced the Civil Suit No. D4-22-1149-1993 in the Kuala Lumpur High Court ("the said High Court action") on 13 October 1993 against the first, second and third defendants seeking, *inter alia*, an order that the second and third defendants transfer the trade mark "Indomie" to the first plaintiff. The second and third defendants filed a defence on 19 November 1993 to which the plaintiffs filed a reply on 24 November 1993. The first defendant, which did not file a defence had default judgment entered against it and was subsequently ordered to be wound up.

ii. Though pleadings were deemed to be closed on 8 December 1993, the plaintiffs never filed a summons for directions or set the action down for trial.

iii. About nine years after the commencement of the suit ie, on 22 October 2002, the plaintiffs' solicitors filed an application purportedly on behalf of the parties named as the first and second plaintiffs and PT Indofood Sukses Makmur Tbk ("Sukses Makmur") to substitute Sukses Makmur for the said first and second plaintiffs on the grounds that:

(a) Sukses Makmur had taken over the rights and liabilities of the first and second plaintiffs pursuant to a purported merger in Indonesia; and

(b) the first and second plaintiffs had been dissolved and liquidated as at 1 March 1994.

iv. The second and third defendants meanwhile filed an application on 1 November 2002 to strike out the plaintiffs' action for want of prosecution. The said application was dismissed by the learned deputy registrar on 28 May 2004.

v. On 25 June 2004 the learned deputy registrar allowed the application for substitution. The second and third defendants filed an appeal against the said decision to the judge in chambers who on 25 April 2005 allowed the said appeal by the second and third defendants as there was insufficient evidence to show that Sukses Makmur had taken over all the rights, obligations, assets and liabilities of the first and second plaintiffs. Further, important documents in connection with that issue were not adduced in evidence by the plaintiffs and Sukses Makmur who would have had possession of the same.

vi. When the appeal was first heard before the judge on 22 March 2005, the learned judge directed that further evidence to be adduced to support the application for substitution. The solicitors for the second and third defendants had written to the court, *via* letter dated 22 March 2005, objecting to the further evidence being adduced at the hearing of the appeal unless they satisfied the conditions set out in O. 56 r. 1(3A) of Rules of High Court 1980. No further evidence was adduced by the first and second plaintiffs and Sukses Makmur.

vii. The first and second plaintiffs and Sukses Makmur have appealed against the said decision to the Court of Appeal and that appeal has been registered as the Court of Appeal Civil Appeal No. W-02-653-2005.

viii. On 23 June 2005 Sukses Makmur filed an application to be joined as plaintiff in the said High Court action on substantially the same grounds as the application for substitution referred to earlier. It relied on the same evidence adduced in the application for substitution. That application which was opposed by the second and third defendants was allowed by the learned judge on 20 July 2005. It was contended by the appellants that the learned judge erred in granting the order for joinder especially when he had earlier dismissed the application for substitution which had been made on the same grounds and on the same evidence which he had found to be insufficient. The Civil Appeal No. W-02-968-2005 herein is in respect of the said decision. The second and third defendants contended that the basis for the application for joinder is not consistent with the admission made by Sukses Makmur that the first and second plaintiffs had been dissolved and liquidated as at 1 March 1994 in the application for substitution.

ix. On 27 June 2005 the learned judge dismissed the appeal by the second and third defendants against the decision of the deputy registrar who had on 28 May 2004 dismissed the said defendants' application to strike out the plaintiffs' action for want of prosecution. The Civil Appeal No. W-02-738-2005 herein is in respect of the said decision. The learned judge then proceeded to schedule trial dates on 25 October 2005, 26 October 2005 and 27 October 2005.

x. On 15 September 2005 the second and third defendants filed an application in the High Court action for an order that the proceedings therein be stayed pending the disposal of the second and third defendants' appeals. That application was heard and dismissed by the learned judge on 12 October 2005.

xi. The second and third defendants then filed the present said two notices of motion in the Court of Appeal for stay of proceedings in the High Court action.

[5] Having heard the submissions of learned counsel for the plaintiffs and the defendants and having studied the affidavits filed by the respective parties, it is our judgment that the said Civil Suit No. D4-22-1149-1993 should without further delay go for trial before the High Court. The parties should stop finding fault and hurling allegations against one another to derail the proper conduct of the trial.

[6] As regards the allegation of prejudice caused by the delay in the commencement of the trial of the said Civil Suit No. D4-22-1149-1993 we noted that this suit was filed in 1993 and relate to incidents which occurred as far back as 1991. It is critical for both parties that the testimony and evidence of the witnesses be heard immediately. It is for this reason that on 27 June 2005, counsel for the plaintiffs informed the High Court of the plaintiffs' desire for a speedy trial and moved the court for early trial dates. The High Court very kindly accommodated the request and fixed trial dates on 25, 26 and 27 October 2005 without any objections from counsel for the defendants.

[7] We also noted that counsel for both parties had thereafter attended before the High Court again on 20 July 2005 at which time further directions were given by the court for witness statements to be delivered before the next pre-trial conference for case management on 12 September 2005. Again, no objections were taken by counsel for the defendants. Further pre-trial directions for the conduct of the trial were given by the High Court on 15 September 2005, on which date counsel for the defendants had also expressly participated in the conference. For example, he did not object to the observation made by counsel for the plaintiffs for a split trial on liability and damages. Counsel for the defendants also sought time from the court to filed the amended defence and prepare the analysis of pleadings and witness statements.

[8] We find that by the subsequent pre-trial conference for case management on 12 October 2005, the plaintiffs' solicitors had already served the plaintiffs' bundle of documents on the defendants' solicitors and the plaintiffs' witness statements. Counsel for the plaintiffs had also informed the High Court of the primary issue to be determined at the trial and confirmed the number of witnesses to be called on behalf of the plaintiffs. We were also informed by learned counsel for the plaintiffs that a final

A pre-trial conference for case management was just completed on 19 October 2005 when the finalized analysis of pleadings prepared by the defendants was handed to the High Court. It is our considered view that the defendants are estopped from seeking an order to stay the trial by reason of their conduct and participation
B in pre-trial conferences for case management before this court.

[9] It is our judgment that there are no special circumstances justifying a stay of the trial in the High Court as any prejudice that may be suffered by the defendants may be compensated in
C costs. As it is now we find that the defendants have not shown how the defendants' appeals in Civil Appeal No. W-02-738-2005 and Civil Appeal No. W-02-968-2005 may be rendered nugatory if the trial of this action is proceeded with.

D **[10]** As to the complaint and dissatisfaction of the defendants that Sukses Makmur has been added jointly as the third plaintiff in the said High Court action, we are of the view by reason of this joinder all parties are now before the court. All matters in dispute in the case may be effectually and completely determined and adjudicated before the High Court. Even assuming the defendants
E succeed in their appeals, the first and second plaintiffs can still prosecute the claim. All in all, we are of the view that if the trial is adjourned, the plaintiffs will suffer grave prejudice. Conversely, if the trial proceed as scheduled, the defendants will suffer no
F prejudice.

[11] For the reasons above stated we would dismiss the defendants' appeal in Civil Appeal No. W-02-738-2005 and Civil Appeal No. W-02-968-2005. We also make an order that the appeal by the plaintiff in Civil Appeal No. W-02-653-2005 be
G withdrawn and dismissed. As to the costs of proceedings of the three appeals before this court, the costs are to follow the event of the trial before the High Court. Deposits paid are to be refunded to the respective parties to the present three appeals.

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